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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 2

BAYSIDE FISH FLOUR COMPANY,
Appellant,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, ET AL.,
Appellees.

APPELLEES' BRIEF

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STATEMENT OF THE CASE

This is an appeal by appellant, plaintiff in the court below, from a decree of a three judge court granting appellees' motion to dismiss the bill of complaint. (8 Fed. Supp. 67.)

STATEMENT OF THE FACTS

Appellant is a corporation engaged in the business of manufacturing, under a patented process, fish flour from sardines caught on the high seas beyond the three mile limit of the State of Cali-

fornia. Appellant's plant is located at Point San Pablo within the State of California. Appellant brought suit to enjoin the Fish and Game Commission of the State of California, its executive officers and the Attorney General, from executing and enforcing the provisions of the Statutes of 1933, page 394, establishing a Fish and Game Code revising and consolidating the law of California relating to fish and game and other wild life and containing among its provisions certain commercial fishing regulations.

Sections 1060 to 1077 inclusive, Fish and Game Code.

Under the provisions of section 1068 of that code the commission granted to appellant a permit to take and use a certain tonnage of sardines. The action instituted by appellant sought to enjoin appellees from enforcing the terms of such permit and limiting the amount of sardines which the appellant could take and use in its reduction plant.

ARGUMENT

I

The Sections of the Fish and Game Code Do Not Directly Interfere with Interstate Commerce

It is appellant's contention that the sections of the code in question were not passed by the legislature of the State of California in the exercise of

its legitimate police power and that the legislative enactment under review bears no relation to conservation of resources.

In support of this position appellant relies upon the case of

Foster Packing Company vs. *Haydel,* 278 U. S. 1

wherein this court declared unconstitutional the Louisiana Shrimp Act. In that case this court found that the real purpose of the legislation in question was to prevent the raw shrimp from being moved, as had theretofore been done, from Louisiana to a point in Mississippi to be packed and canned and sold in interstate commerce and thus force, through commercial necessity, the removal of the packing and canning industries from the state of Mississippi to the state of Louisiana. A similar contention to that made by Appellant here was made in

Van Camp Sea Food Co. vs. *Department of Natural Resources,* 30 Fed. 2d 111.

In speaking of this contention the court said:

> "The power of the states to protect game and fish within their borders by appropriate legislation is now too firmly established to admit of further controversy. *Geer* v. *Connecticut,* 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793; *Ward* v. *Race Horse,* 163 U. S. 504, 16 S. Ct. 1076, 41 L. Ed. 244; *Silz* v. *Hesterberg,* 211 U. S. 31, 29 S. Ct. 10, 53 L. Ed. 75; *Patsone* v. *Pennsylvania,* 232 U. S. 138, 34 S. Ct. 281, 58 L. Ed. 539; *Ken-*

nedy v. *Becker,* 241 U. S. 556, 36 S. Ct. 705, 60 L. Ed. 1166; *Carey* v. *South Dakota,* 250 U. S. 118, 39 S. Ct. 403, 63 L. Ed. 886; *La Coste* v. *Dept. of Conservation,* 263 U. S. 545, 44 S. Ct. 186, 68 L. Ed. 437.

In the case last cited, the court said: 'The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the state may regulate and control the taking, subsequent use and property rights that may be acquired therein.' Indeed, the power of the state to prohibit the shipment of game lawfully taken within its borders to points without the state, and to prohibit the possession of game within the state, when shipped from points without the state, has repeatedly been recognized by the Supreme Court. And on the argument of this case it was practically conceded that, for a period of about ten years, the decisions to which we have referred were deemed ample warrant for the legislation and regulations now in question, but it is earnestly insisted that the rule established by these decisions was overthrown and annulled by the recent decision of the Supreme Court in *Foster-Fountain Packing Co.* v. *Haydel,* decided October 13, 1928, 49 S. Ct. 1, 73 L. Ed. With this contention we are unable to agree. The legislation of the state of Louisiana there involved prohibited the shipment of unshelled shrimp to points without the state, and the court found that this prohibition was a mere subterfuge to bring about the removal of packing and

canning industries from the state of Mississippi to the state of Louisiana. The basis for the decision is found in the following paragraph of the opinion: 'The facts alleged in the complaint, the details set forth in plaintiff's affidavits and the provisions of the Act to be restrained show that the conservation of hulls and heads is a feigned and not the real purpose. They support plaintiffs' contention that the purpose of the enactment is to prevent the interstate movement of raw shrimp from the Louisiana marshes to the plants at Biloxi in order through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The conditions imposed by the Act upon the interstate movement of the meat and other products of shrimp are not intended and do not operate to conserve them for the use of the people of the State.' ''

II

SECTIONS 1064, 1065 AND 1076 OF THE FISH AND GAME CODE DO NOT DEPRIVE APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW

Appellant contends that the operation of the sections in question deprive it of its right to contract with the fishermen to deliver fish to its reduction plant, and that the right to contract is property. In support of this position appellant relies upon:

St. Louis Cotton Compress Co. vs. *Arkansas,* 260 U. S. 346;

Weaver vs. *Palmer,* 270 U. S. 402;

Jay Burns Baking Co. vs. *Bryan, Gov. of Nebraska,* 264 U. S. 504

none of which are in point, for in the instant case we are dealing with a natural resource owned by the people in their sovereign capacity which can become the subject of possession, ownership and use only to such limited extent as the legislature may prescribe. In speaking of this question the Supreme Court of California, in

People vs. *Monterey Fish Products Company*, 195 Cal. 548,

said at page 563:

> "Such fish can become the subject of private ownership only in such qualified way, to such limited extent, and subject to such conditions and limitations as the state through its legislature may see fit to provide and impose (In re *Phoedovius, supra; Paladini* v. *Superior Court*, 178 Cal. 369 (173 Pac. 588)). 'It is, therefore, evident that what the people of the state own they can alienate on such terms as they choose to impose, and that this power of regulation continues so long as such fish or game are the subject of trade or transfer.' (*Paladini* v. *Superior Court, supra.*) In section 4 of the act of 1917, *supra* (Stats. 1917, p. 1674), the legislature imposed the following limitations: 'No such fish shall be caught, taken or killed in any manner or at any time except that the person so catching, taking or killing, or having the same in his possession, irrespective of the manner in which they were obtained, shall by such act or possession thereby consent that the title to such fish shall be and remain in the State of California for the purpose of regulating and

controlling the use and disposition of same after such catching, taking or killing, and except that the title to such fish legally taken shall vest in the person so taking or possessing them, subject to the restrictions and provisions of law.' "

III

SECTIONS 1064 AND 1065 OF THE FISH AND GAME CODE DO NOT DENY TO APPELLANT THE EQUAL PROTECTION OF THE LAW

It is appellant's contention that the provisions of section 1064 prohibiting the use of any fish or part thereof in a reduction plant or by a reduction process, except as allowed by the code, discriminates in favor of the packer who packs sardines in tin cans. A reduction plant is defined by subdivision (a) of section 1060 of the Fish and Game Code as

" 'Reduction plant' means any plant used in the reduction of fish into fish flour, fish meal, fish scrap, fertilizer, fish oil or fishery products or by-products."

Section 1068 of the Fish and Game Code provides:

"The Commission may grant a revocable permit, subject to such restrictions, rules or regulations as the commission may prescribe, to take and use fish by a reduction or extraction process. No reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish."

It is apparent from these provisions that the prohibition of the section pertains to all persons in the State of California reducing fish, be such persons canners or straight reductionists, and there is no discrimination against appellant or those similarly situated. In

Ex parte Kennke, 136 Cal. 527,

the Supreme Court of California said at page 528:

> "Wild game belongs to the whole people, and the legislature may dispose of it as may seem to it best, subject only to constitutional limitations against discriminations. Within those limitations the legislature, for the purpose of protecting game, may pass such laws as to it seem most wise; and 'the measures best adapted to that end are for the legislature to determine, and courts cannot review its discretion.' (*Ex parte Maier,* 103 Cal. 476, and cases there cited.)"

The reason for requiring a permit before fish may be reduced and definitely fixing in such permit the limit of fish which may be taken for that purpose, while not requiring such permit in order to pack, cure or can fish, at once suggests itself. The amount of fish which may be taken and used by a reduction or extraction process is practically unlimited by reason of the simplicity and rapidity of operation of such process. On the other hand the process of packing, canning or preserving fish is a more complicated, laborious and slow process and as a result the amount of fish which can be taken

and used by that process is restricted by these factors.

We submit that the action of the lower court in granting appellant's motion to dismiss the bill of complaint was proper and the decree of that court should be affirmed.

Respectfully submitted.

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